APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 317—September Term, 1967.

(Argued February 7, 1968 Decided May 14, 1968.)

Docket No. 31915

CROWN COAT FRONT CO., INC.,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

WATERMAN and FEINBERG, *Circuit Judges,*
and BARTELS, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, Walter R. Mansfield, *J.*, dismissing plaintiff's complaint as time-barred. Affirmed.

EDWIN J. MCDERMOTT, Philadelphia, Pa. (Charles J. Nager, New York, N. Y., on the brief), *for Plaintiff-Appellant.*

* Of the Eastern District of New York, sitting by designation.

ALAN G. BLUMBERG, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Lawrence W. Schilling, Assistant United States Attorney, on the brief), *for Defendant-Appellee.*

FEINBERG, *Circuit Judge*:

In 1956, the amount due plaintiff Crown Coat Front Co., Inc. on a contract with defendant United States was reduced by the sum of $270.01 out of a total contract price exceeding $60,000. This minor price adjustment, incredibly, has led to years of still unfinished litigation before the Armed Services Board of Contract Appeals, the United States District Court for the Southern District of New York, this court *in banc,* and the United States Supreme Court.[1] And now, in the latest phase of its dogged pursuit of its remedies, Crown Coat again appeals from a judgment of the United States District Court for the Southern District of New York, Walter R. Mansfield, *J.,* dismissing as time-barred its complaint for damages against defendant United States. For reasons set forth below, we affirm.

As a prelude to further discussion of this appeal, three factors must be stressed. First, a contractor suing the Government must ordinarily do so within six years from the date his right of action accrues. Second, there is a conceptual difference between so-called "disputes clause" claims and "breach" claims growing out of a contract with the Government. Although it is frequently difficult to tell

1 In addition to the proceedings discussed in this opinion, Crown Coat has litigated other issues under this and a related contract, see, e.g., *Crown Coat Front Co.* v. *United States,* 292 F. 2d 290 (Ct. Cl. 1961); *Crown Coat Front Co., Inc.,* 61-2 B. C. A. ¶3157 (ASBCA No. 7096) (1961).

into which category a specific claim falls,[2] at least this much can be said: "Disputes clause" claims are "redressable under specific contract adjustment provisions" and therefore subject to the disputes procedure set forth in the contract; "breach" claims are not. *United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 404 n. 6 (1966). Third, the prior opinion of this court sitting *in banc*, *Crown Coat Front Co.* v. *United States*, 363 F. 2d 407 (1966), still retains significance on certain issues decided therein even though it was reversed on other grounds.

With these points in mind, we turn to the facts of this controversy, which can be related substantially as they appear in the opinion of the Supreme Court, 386 U. S. 503, 507-08 (1967), but with important additions for matters the parties did not stress there. On May 14, 1956, Crown Coat contracted with the United States to supply a specified number of canteen covers which were to be lined with mildew-resistant felt of certain specifications. The Government, which was authorized to inspect materials to be used under the contract, tested and rejected certain samples of felt furnished by Crown Coat because they allegedly did not contain the contract quantities of mildew inhibitors. Crown Coat agreed to a price reduction of one-half cent per canteen cover, a total of $270.01, and was permitted to complete the contract with the rejected felt. Final delivery, originally scheduled for October 11, 1956, was made on December 14, 1956.

In March 1959, Crown Coat allegedly first discovered the nature of the tests which the United States had performed on the felt. Objecting to the use of such tests, Crown Coat filed a claim with the government contracting officer in

2 See, e.g., *United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394 (1966); *Len Co.* v. *United States*, 385 F. 2d 438 (Ct. Cl. 1967); *Nager Elec. Co.* v. *United States*, 368 F. 2d 847, 862 (Ct. Cl. 1966).

October 1961. Crown Coat contended that use of an improper test was a "change in contract specifications" under the "changes" clause of the contract,[3] entitling it to an equitable adjustment in the form of a refund of the price reduction and compensation for increased costs occasioned by substantial delay resulting from the Government's rejection of the felt samples. The claim was brought before the contracting officer as a disagreement on a question of fact within the meaning of the "disputes" clause of the contract,[4] which requires that administrative relief be exhausted. On February 21, 1962, the contracting officer denied the claim which had been submitted to him; within a week, Crown Coat appealed to the Armed Services Board of Contract Appeals, a further administrative step required for assertion of a disputes clause claim. As the expiration of six years from the 1956 final delivery date approached, the Board had not yet ruled. On December 12, 1962, just two days before the end of the six-year period, Crown Coat filed a complaint in the Court of Claims under 28 U. S. C. §1491, seeking $25,270.01 damages for breach of the contract by use of improper tests. Two months later, on February 28, 1963, the Board of Contract Appeals affirmed the contracting officer's decision.

On July 31, 1963, Crown Coat commenced the instant action in the United States District Court for the Southern District of New York pursuant to the Tucker Act, 28 U. S. C. §1346(a)(2). The complaint alleged that the Board of Contract Appeals decision was capricious, arbitrary and not supported by substantial evidence, and asserted that use

3 The actual "changes" clause employed in this contract does not appear in the record. The standardized version of a changes clause appears at 32 C. F. R. §7.103-2 (1967).

4 The contract's "disputes" clause is set out in the Supreme Court's opinion, 386 U. S. at 505 n. 1.

of improper and inaccurate tests entitled Crown Coat to an equitable adjustment under the contract's changes clause; the amount sought was $9,500.[5] At this point, therefore, there were then pending against the Government two actions growing out of the same transaction: one filed in the Court of Claims in December 1962, and the other filed in the district court in July 1963. The parties then returned to the Court of Claims. Because of the pendency of the district court proceedings, see 28 U. S. C. §1500, Crown Coat moved to "suspend" its action in the Court of Claims, and the Government moved to dismiss. In September 1963, the Court of Claims dismissed the action, without prejudice.[6]

The district court action was thus left standing alone. In that action, the United States, among other things, asserted that the suit was time-barred under 28 U. S. C. §2401 (a), because it was brought more than six years after it had accrued.[7] Chief Judge Ryan agreed and dismissed the action on that ground.[8] This court, sitting *in banc*, affirmed that dismissal in a five-to-four decision, 363 F. 2d 407 (1966). All nine judges agreed that Crown Coat's action

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5 Under §1346(a)(2), the district court's jurisdiction is limited to claims not exceeding $10,000. In order to invoke the court's jurisdiction, plaintiff therefore demanded judgment for "Nine thousand Five hundred dollars or such amount not exceeding Ten thousand dollars as the Court may deem just and equitable."

6 *Crown Coat Front Co.* v. *United States*, Dkt. No. 395-62 (Ct. Cl. Sept. 20, 1963).

7 Section 2401(a) provides:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

8 *Crown Coat Front Co.* v. *United States*, No. 63 Civ. 2281 (S. D. N. Y. Jan. 29, 1965).

accrued on December 14, 1956, the date of the final delivery of the canteen covers by Crown Coat. The issue that divided this court was whether the administrative proceeding before the contracting officer and the Board of Contract Appeals tolled the applicable six-year statute of limitations; if it did not, the district court suit in July 1963 was not timely. The majority held that the statute was not tolled; the minority thought that it was. Thereafter, the Supreme Court reversed, 386 U. S. 503 (1967), but on an entirely different theory, and did not discuss the tolling question that had divided this court. The Court held that a disputes clause action does not even accrue until the end of the required administrative proceedings. Therefore, if Crown Coat's claim in the district court action was of that type, it was not barred by the statute of limitations. However, the Court added the following significant statement (*id.* at 522):

> The Government in its answer to the complaint, however, denied that the claim arose under the contract, characterized it instead as a pure breach of contract claim which accrued no later than the date of the completion of the contract. The District Court did not decide this issue; nor do we. This matter will be open on remand to the District Court. If the claim is not within the disputes clause, the court may then determine whether it is time-barred.

Thus, Crown Coat found itself back in the district court with an indication from the Supreme Court that if its basic claim was after all of the breach rather than the disputes clause variety, it might be untimely. Thereupon, for reasons best known only to it, Crown Coat moved to amend its complaint in the district court to assert a breach

of contract claim for $19,556.03. The Government consented to the change in the theory of the complaint. However, it contended that the statute of limitations clearly barred the breach action, since all nine judges of this court had ruled that the claim accrued in December 1956, more than six years before the action was filed in July 1963. Crown Coat replied, *inter alia,* that the action it had brought in the Court of Claims in December 1962, which was timely when filed,[9] tolled the statute of limitations. In any event, it urged the district court not to pass upon the statute of limitations question but to exercise its power to transfer the district court action to the Court of Claims under 28 U. S. C. §1406(c). That section provides:

> If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

Crown Coat pointed out that if its amendment to increase the damages claimed was allowed, the district court would no longer have jurisdiction[10] and the case would be within the exclusive jurisdiction of the Court of Claims and, therefore, subject to transfer.

Judge Mansfield denied the damage amount amendment as not in the interest of justice. On the tolling issue, the judge reasoned that congressional consent to suit should be strictly construed as a waiver of sovereign immunity; he held that "Commencement of an action against the Gov-

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9 28 U. S. C. §2501 provides a six-year statute of limitations for actions filed in the Court of Claims.

10 See note 5 *supra.*

ernment that is later dismissed without prejudice as improperly brought does not . . . toll the statute of limitations." Accordingly, he refused to transfer the district court action to the Court of Claims and dismissed the complaint. 275 F. Supp. 10 (S. D. N. Y. 1967). It is from this decision that Crown Coat appeals.

Thus, we have the following chain of events: Crown Coat, having established at great effort that a disputes clause claim was timely, returned to the district court and voluntarily relinquished all that it had won. It agreed that its claim was a breach claim even though all nine active judges of this court had apparently ruled *in banc* that any claim for breach of contract accrued no later than December 14, 1956, more than six years before the action in the district court was commenced. Nevertheless, its motion in the district court for an amendment of theory and increase of damages and transfer to the Court of Claims made no mention of the statute of limitations problem. Then, when the Government raised the point, Crown Coat first took the position that the district court should transfer the action to the Court of Claims without deciding the question. Finally, it met the issue head-on with two arguments not made before: (1) The filing of its 1962 action in the Court of Claims tolled the statute of limitations until the district court complaint was filed; and (2) its claim did not arise until March 1959, when it discovered the nature of the tests used by the Government, because until that date the Government "concealed" the facts.

The issues before us are whether Judge Mansfield erred in refusing to allow an increase in damages claimed and in dismissing the complaint. Decision of the first question rested in the judge's discretion. While it is true that Rule 15 of the Federal Rules of Civil Procedure provides that

ordinarily leave to amend "shall be freely given when justice so requires," these were most unusual circumstances. Crown Coat had offered as its claim three different figures at three different times. Originally, in 1962, it sought $25,270.01 in the Court of Claims; in 1963, in the district court, it asked for $9,500; finally, its proposed amended complaint sought $19,556.03. Although Crown Coat had first sued in the Court of Claims in 1962, it later aborted that suit itself by bringing another action in the Southern District. Moreover, when faced in 1963 with the imminent dismissal of its Court of Claims action because of the pendency of the district court suit, it chose to allow the latter to continue rather than to amend or add to its original Court of Claims complaint. Cf. *Nager Elec. Co.* v. *United States*, 368 F. 2d 847, 854-57 (1966). We agree with Judge Mansfield, 275 F. Supp. at 14-15:

> This is not a case of inadvertent error but one where suit was deliberately brought in this forum with full knowledge of its jurisdictional limitations instead of exercising its right to join two alternate theories ("breach" and "disputes clause") in one suit in the Court of Claims, where the plaintiff now seeks a transfer for a procedural or tactical advantage, after having invoked the facilities of the federal courts all the way to the Supreme Court, at no little time and expense to the Government. After such a tour de force the additional claim appears frivolous, and further shuttling back and forth between this Court and the Court of Claims is unjustified. Accordingly the motion to amend is denied. [Footnote omitted.]

Accordingly, we hold that the judge did not abuse his discretion in denying amendment of the complaint to allege greater damages.

We turn now to the judge's decision to dismiss the complaint. The argument that the Government concealed the test method employed, so that the statute of limitations was tolled, was properly rejected by the judge for the reasons set forth in his opinion, *id.* at 15-16, and requires no further discussion. The exhuming of the 1962 action in the Court of Claims as a separate ground for tolling the statute of limitations does raise a more substantial question.[11] But after careful analysis, we conclude that this argument should also be rejected.

Crown Coat conceded in the district court before Judge Mansfield, *id.* at 15, that a breach claim accrued on December 14, 1956, a concession consistent with the opinions of this court in its *in banc* consideration of the case. The basic issue is whether the events of this case justify tolling the time bar of 28 U. S. C. §2401(a).[12] Crown Coat litigated this question through the district court, this court (*in banc*), and the Supreme Court without once offering the 1962 Court of Claims action as a basis for tolling. In the prior decision of this court sitting *in banc*, the majority refused to construe section 2401(a) to allow tolling, even though faced with an appealing argument; i.e., that the Government, which requires administrative proceedings on disputes clause claims, can by drawing those proceedings out

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11 In essence, Crown Coat argues that it is within the intent of Congress to allow tolling when a properly filed and timely complaint in one federal court (Court of Claims) is later replaced by an equally proper but untimely action in another federal court (a district court). Compare *Burnett* v. *New York Central R.R.*, 380 U. S. 424 (1965). The Government argues that bringing suit in the Court of Claims against the Government does not toll the separate statute of limitations for suing the Government in the district court, particularly when the former action is dismissed because of plaintiff's own acts. The Government points out that were this not the case, the transfer provisions of 28 U. S. C. §§1406(a), (c) would be unnecessary.

12 See note 7 *supra*.

long enough "effectively defeat the rights of claimants to present their claims to a court of law," 363 F. 2d at 415. That justification for tolling was certainly more powerful than the one offered now, which is marred by Crown Coat's own inconsistent actions. It is true that this new tolling contention was not specifically made by Crown Coat to the *in banc* court so that traditional law of the case concepts would not technically apply. However, we regard the court's refusal to construe the statute of limitations as tolled by the appealing facts then offered as overpowering evidence of how it would have ruled on the argument Crown Coat now makes. It is significant that the prior *in banc* decision of this court was not overruled on the tolling issue; the Supreme Court did not discuss or decide it. Moreover, there does come a time when additional arguments to make the same ultimate point should be disregarded unless a good reason exists for the earlier omission. Cf. *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 953 (2d Cir.), cert. denied, 377 U. S. 934 (1964). Certainly, if after affirmance here, plaintiff were to advance still another argument for tolling, we think the district court or we could properly disregard it. We think that the situation now before us is much the same. In the district court the first time around, plaintiff could have urged the tolling effect of the 1962 action in the Court of Claims, whether plaintiff's claim was regarded as a breach or disputes clause type. In fact, before Chief Judge Ryan, plaintiff clearly envisioned both possibilities,[13] yet it chose to ignore the argument. Under all of the circum-

13 See Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 9-10, Supplemental Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 1-2, and Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 2, *Crown Coat Front Co.* v. *United States*, No. 63 Civ. 2281 (S. D. N. Y. Jan. 29, 1965).

stances, whatever might be the views of some of us were this or related statute of limitations issues[14] raised in a different case, we do not feel justified in considering further the tolling effect of plaintiff's 1962 action in the Court of Claims.

Accordingly, we affirm the decision below.

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14 E.g., in *Nager Elec. Co.* v. *United States*, 368 F. 2d 847 (Ct. Cl. 1966), the court stated that when a contractor has both disputes and breach claims under a single contract, suit on the latter can be delayed until administrative proceedings in the former are completed. We have not considered that point because Crown Coat clearly states it has only a breach claim.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2281

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CROWN COAT FRONT CO., INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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MANSFIELD, D.J.

Plaintiff has moved to amend its complaint to state a claim for breach of contract in the amount of $19,556.03 and to transfer the case, over which this Court would no longer have jurisdiction, to the Court of Claims pursuant to 28 U. S. C.

§1406(c).[1] The parties have requested that this Court also determine whether the claim is barred by the statute of limitations.

This time-worn and weary case arises out of a May 14, 1956 contract between the plaintiff and the Government whereby the plaintiff was to manufacture 89,786 felt canteen covers and deliver them to the Government for a price of $60,691.76. Under the contract it was the Government's prerogative to test the covers for mildew resistance and to reject them if they did not meet specifications. The Government made such tests in October and November, 1956, found that the covers did not meet the specified standards with respect to mildew, but ultimately accepted the goods after agreeing to a reduction of $270.01 from the contract price.

Plaintiff claims that it did not discover until March 20, 1959 that the Government had tested the samples by a method different from that which had been contemplated under the contract. No action appears to have been taken thereafter by the plaintiff, however, for the next two and one-half years.

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[1] 28 U.S.C. §1406(c) provides in pertinent part:

"If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court."

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On October 4, 1961, acting pursuant to the *"standard disputes"* clause[2] in the contract which provided that *"any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided"* by the Contracting Officer whose decision could

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[2] The clause provided:

> *"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision by the Secretary or his duly authorized representative for the hearing of such appeals shall unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be*

be appealed to the Armed Services Board of Contract Appeals ("*Board*" herein), plaintiff's counsel wrote the Contracting Officer demanding a refund of the $270.01 adjustment and an equitable adjustment with respect to plaintiff's increased production costs which resulted from the initial wrongful rejection of the samples. The claim was made under the "*Changes*" clause of the contract which provided that "*an equitable adjustment would be made in the contract price or delivery schedule*" if the Contracting Officer should make changes within the scope of the contract and that failure to agree on such an adjustment would give rise to a question of fact within the meaning of the "*disputes*" clause.[3] On February 21, 1962, the Contracting Officer filed his decision finding that the test methods employed by the Government had been entirely appropriate. The Board affirmed the contracting officer's denial of the claim on February 28, 1963.

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heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

[3] While the record does not indicate the specific provisions of the "*Changes*" clause, the standard clause provides:

"The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes

On July 31, 1963 plaintiff brought this suit to review the Board's decision under the Tucker Act (28 U.S.C. § 1346

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within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change, provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any

(a)(2))[4] seeking a return of the $270.01 and damages not exceeding $10,000 which represented plaintiff's increased production costs resulting from the initial rejection of the goods. The complaint alleged that the Government's performance of the tests of the canteen covers for mildew constituted a *"change in contract specifications"* (Par. 10) entitling the plaintiff to an upward price adjustment under the contract's *"Changes"* clause; and that the Board's contrary decision of February 28, 1963 was not entitled to finality for the reason that it was *"capricious, arbitrary and not supported by substantial evidence, and concerned questions of law"*, entitling the plaintiff *"to an*

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adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed." 32 C.F.R.§7.103-2.

[4] 28 U.S.C. §1346(a)(2) provides that the district courts shall have original jurisdiction, concurrent with the Court of Claims of:

> *"Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United*

equitable adjustment of the contract price". On February 2, 1965 the district court dismissed plaintiff's claim as barred by the six-year statute of limitations applicable to actions against the United States.[5] The Court of Appeals affirmed en banc, 363 F.2d 407, and the Supreme Court reversed on the ground that if the claim was one *"arising under the contract"* the right of action did not accrue until the Board finally ruled on the claim. 386 U.S. 503. In view of the fact that the Government denied that the claim was one *"arising under"* the contract and contended that it was a *"pure breach of contract claim which accrued not later than the date of the contract"*, the Supreme Court remanded the case to the district court for determination of that issue with the advice that *"If the claim is not within the disputes clause, the court may then determine whether it is time-barred."*

States, or for liquidated damages or unliquidated damages in cases not sounding in tort."

[5] 28 U.S.C. §2401 provides:

"(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

During the pendency of the foregoing proceedings the plaintiff on December 12, 1962, commenced a suit in the Court of Claims for breach of the contract, praying for $25,000 damages. On September 29, 1963, the Court of Claims action was dismissed without prejudice due to the pendency of the present case.

After having obtained a favorable decision from the Supreme Court on the basis of its contention that its claim in the present suit was one *"arising under"* the contract, plaintiff now for the first time states that it *"accepts the Government's viewpoint that the claim asserted by plaintiff herein is a pure breach of contract"* (P. 1, *"Memorandum of Points and Authorities"* submitted August 1, 1967)[6] and asks leave to amend the complaint to assert a simple breach of contract claim for damages in the sum of $19,556.03, instead of its claim based on the alleged arbitrary action of the Board in denying its claim for equitable adjustment under the *"Changes"* and *"Disputes"* clauses of the contract.

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[6] See also *"Plaintiff's Reply Memorandum of Law re Statute of Limitations"* which bears as POINT I heading *"Plaintiff's claim is for a breach of contract"* and states (p. 7) *"The parties have agreed that plaintiff's claim is for breach"* and (p. 8) *"The parties now agree that the issue before the Court arose from breach of contract and not as a claim 'arising under' the Changes article of the contract."*

Insofar as plaintiff seeks to amend the complaint to increase the ad damnum to $19,556.03 and to have the case transferred to the Court of Claims on the ground that this Court would thereby oust itself of jurisdiction, 28 U.S.C. §1346(a)(2) and *Luria Bros. & Co. v. United States*, 369 F.2d 701 (Ct. Cl. 1966), such relief does not appear to be in the interest of justice. See Rule 15(a), F.R.C.P. and 28 U.S.C. §1406(c). There is no showing that the increased damages were not known when the action was begun in July 1963 or that they could not have been asserted either under the *"Changes"* clause of the contract, in which event the case might have been transferred to the Court of Claims long before the extensive proceedings herein, or joined with the *"disputes"* claim as alternative claims in an action in the Court of Claims. This is not a case of inadvertent error but one where suit was deliberately brought in this form with full knowledge of its jurisdictional limitations instead of exercising its right to join two alternate theories (*"breach"* and *"disputes clause"*) in one suit in the Court of Claims, where the plaintiff now seeks a transfer for a procedural or tactical advantage,[7] after having invoked the facilities of the federal

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[7] The tactical advantage would apparently lie in the fact (noted below) that the Second Circuit in this case has held that any *"breach"* claim accrued on December 14, 1956, 363 F.2d 407, 410, whereas

courts all the way to the Supreme Court, at no little time and expense to the Government. After such a tour de force the additional claim appears frivolous, and further shuttling back and forth between this Court and the Court of Claims is unjustified. Accordingly the motion to amend is denied.

Since both sides agree that the claim is one for breach of contract and have asked this Court to rule on the question of whether it is time-barred, as suggested by the Supreme Court, this Court has considered the question and concludes that the claim is barred by the six-year statute of limitations. 28 U.S.C. §2401, *supra*, note 5.

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the Court of Claims has indicated in another case, *Nager Electric Co. v. United States*, 368 F.2d 847, 857, that where a *"disputes"* clause claim and *"breach"* claim arise out of a single contract, the time-bar does not start running as to either until the termination of the administrative process. The present case, however, is not one where the plaintiff has joined two claims arising out of the same facts, i.e., one under the *"disputes"* clause and the other for *"breach"*, contending that the time bar was tolled as to the breach claim pending exhaustion of the administrative process with respect to the *"disputes"* clause claim. Plaintiff here concedes that its sole claim is one for *"pure breach of contract"* and offers other arguments (noted below) in support of its contention that the claim is not time-barred.

Upon oral argument both sides took the position that plaintiff's cause of action for breach of contract accrued on December 14, 1956, which was more than six years prior to plaintiff's institution of the present lawsuit on July 31, 1963.[8] Plaintiff asserts, however, that the six-year statute of limitations was tolled on December 12, 1962, when it filed its suit for $25,000 damages in the Court of Claims, which was still pending when the plaintiff filed its suit here. Plaintiff relies heavily on *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965), which held that the statute of limitations was tolled for the duration of a state court FELA suit in Ohio that was dismissed for improper venue. It also refers us to such other cases rejecting the defense of the statute of limitations as *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965); *Berry v. Pacific Sportfishing, Inc.*, 372 F.2d 213 (9th Cir. 1967); *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966); *Izquierdo v. Cities Serv. Oil Co.*, 244 F. Supp. 758 (S.D.N.Y. 1965). Aside from the distinguishing factor of the Supreme Court's emphasis on the humanitarian purpose of the

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[8] This was the conclusion of the Court of Appeals, which stated in its en banc decision, 363 F.2d 407 at 410, "*At the outset we agree with the finding of the court below that the alleged breach of the contract occurred at the very latest on December 14, 1956,*" and is binding on this Court. (Emphasis supplied)

FELA, plaintiff's reliance on *Burnett* is misplaced because the present suit is against the United States, not a private person. See *Kendall v. United States*, 107 U.S. 123 (1882). Since the United States possesses sovereign immunity, it may be sued only under such conditions as Congress specifically permits. Indeed, the terms of the Congressional consent delimit the Court's jurisdiction to entertain the suit. *United States v. Sherwood*, 312 U.S. 584 (1941). Limitations and conditions upon this consent must be strictly observed and exceptions are not to be implied. *Soriano v. United States*, 352 U.S. 270 (1957). For example, generally the running of a statute of limitations provides a defense but does not extinguish the claim, which may be revived with the defendant's consent. In marked contrast the rule regarding limitations of action against the United States is that the statute is jurisdictional and that the running of the prescribed time period extinguishes the claim, which cannot thereafter be revived or waived. See *Finn v. United States*, 123 U.S. 227 (1887). Commencement of an action against the Government that is later dismissed without prejudice as improperly brought does not, therefore, toll the statute of limitations. The language of such cases as *Goldlawhr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962), reveals a clear assumption that such is the law. See, e.g., *Callan v. Lillybelle, Ltd.*, 39 F.R.D. 600 (S.D.N.Y. 1966); and Sen. Rep. 1894, 86th Cong., 2d Sess., 1960 U.S. Code, Cong. & Ad. News 3583.

After the plaintiff, upon argument of the motion, was faced with the foregoing

answer to its *"tolling"* claim, its counsel, with the Court's permission, filed an additional memorandum contending that the Government concealed from it the test method it used and that the cause of action did not accrue until March 20, 1959, when the Government informed the plaintiff of the details of the test, which would render it timely within the meaning of 28 U.S.C. §2401. Plaintiff has nowhere alleged, however, that any fraudulent intent was involved on the part of the Government and, indeed, it would seem that there was none. There is no suggestion that the Government, prior to the time the statute of limitations would normally have run, was unwilling to inform plaintiff of the type of test that had been used. Thus, plaintiff has not set forth the essential facts required to be alleged in cases of this sort. There is a sharp distinction between *"fraudulent concealment"* and failure to ascertain the existence of a cause of action through exercise of due diligence. When Congress wishes the latter to postpone the running of a statute of limitations, it says so (*Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir.), *cert. denied*, 373 U.S. 909 (1963)). The general rule is that lack of knowledge of the existence of a cause of action, or of facts giving rise thereto, will not suspend its accrual for the purposes of the statute of limitations. *Thomas v. United States*, 125 Ct. Cl. 76 (1953); see *Navajo Freight Lines v. United States*, 176 Ct. Cl. 1265 (1966). But even if we indulge in some flexibility and apply a standard of reasonableness in determining the date when a plaintiff should, with the exercise of due diligence, have discovered the

existence of the cause of action, see *Kossick v. United States*, 330 F.2d 933 (2d Cir. 1964), no basis exists for postponing the accrual beyond that date. *Japanese War Notes Claim Assn. v. United States*, 373 F.2d 356 (Ct. Cl. 1967). Here plaintiff has never contended that reasonable diligence would not have revealed the test method long prior to July 31, 1957, which was six years before commencement of the action. Indeed, due diligence would have led the plaintiff to inquire into the test method in 1956, when the Government rejected the samples on the ground that they did not contain the contract quantities of mildew inhibitors. Plaintiff offers no reason for not having done so at that time.

Accordingly, the motion to amend the complaint is denied and the complaint is dismissed as time-barred.

SO ORDERED.

/s/ Walter R. Mansfield
U.S.D.J.

Dated: September 20, 1967.